

F8IHGOMH

Hearing

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 JACQUELINE GOMEZ, et al.,

4 Plaintiffs,

5 v.

15 CV 3326 (CM)

6 LACE ENTERTAINMENT, INC., et
7 al.,

8 Defendants.

-----x

9 New York, N.Y.
10 August 18, 2015
10:00 a.m.

11 Before:

12 HON. COLLEEN MCMAHON,

13 District Judge

14 APPEARANCES

15 HEPWORTH GERSHBAUM & ROTH PLLC
Attorneys for Plaintiffs

16 BY: DAVID A. ROTH
17 REBECCA PREDOVAN

18 SIRKIN KINSLEY & NAZZARINE, CO. LPA
Attorneys for Defendants

19 BY: JENNIFER MARIE KINSLEY
20
21
22
23
24
25

F8IHGOMH

Hearing

1 (Case called)

2 MR. ROTH: David Roth, Hepworth Gershbaum Roth,
3 plaintiffs.

4 MS. PREDOVAN: Rebecca Predovan, Hepworth Gershbaum
5 Roth, plaintiffs.

6 MS. KINSLEY: Jennifer Kinsley for defendants, Anthony
7 Capeci and MLB Enterprises.

8 THE COURT: Okay. Good morning, everybody. Have a
9 seat.

10 Thank you for the submissions that I got. I have read
11 all of the affidavits and declarations. I have read through
12 Mr. Capeci's deposition. I have looked at the exhibits at some
13 length. So you can assume that I'm familiar with all that
14 stuff, and let's get on with the business at hand, which is to
15 cross-examine the witnesses and to complete the record and to
16 argue to me about why this motion should or should not be
17 granted.

18 Now, I gather we had two named plaintiffs. And
19 Ms. Carrasco has admitted that she signed the arbitration
20 agreement. So this hearing is really only about Ms. Gomez; is
21 that correct?

22 MR. ROTH: Yes, your Honor.

23 THE COURT: Okay. Great. Terrific. So,
24 Ms. Predovan, Mr. Roth, the floor is yours.

25 MS. KINSLEY: Your Honor, I apologize for the

F8IHGOMH

Hearing

1 interruption, but before we begin, I have a serious issue and a
2 motion to make before the Court.

3 THE COURT: Yes.

4 MS. KINSLEY: Yesterday at 3:23 p.m. when I was
5 attending a deposition here in New York City, I received three
6 e-mails from opposing counsel, Ms. Predovan, containing
7 Exhibits A through J, a table of contents which also referenced
8 three witness affidavits, and a letter to your Honor.

9 THE COURT: Yes, I have that.

10 MS. KINSLEY: All of that is content that I was not
11 provided and had not previously seen nor have been notified
12 about until yesterday. So, basically, this is a situation
13 where I have been ambushed by my opponent's entire case. The
14 Court's standing policies are clear in Section 5(g) of the
15 Court's individual practices and policies that the affidavits
16 and exhibits are to not only be submitted to the Court in
17 advance of the hearing but exchanged with opposing counsel, and
18 that was to happen last week. Last week came and went with no
19 submissions being provided to me by plaintiffs' counsel.

20 THE COURT: I got the point. I got the point.

21 So what's going on here?

22 MS. KINSLEY: So I'm --

23 THE COURT: I know what you're doing. You want me to
24 adjourn the hearing, which I'm not going to do. But I may be
25 penalizing these people.

F8IHGOMH

Hearing

1 MS. PREDOVAN: Your Honor, if I may. First of all, I
2 believe that Rule G indicates that the exhibits were to be
3 exchanged and not the affidavits. I actually have --

4 THE COURT: On the contrary. Everything. Everything.
5 How is she supposed to cross-examine?

6 MS. PREDOVAN: I had --

7 THE COURT: We're going to sit here while she reads
8 the affidavits. We're all going to sit here in the
9 courtroom -- you, your clients, me, sitting here on the bench
10 doing nothing, twiddling my thumbs, while she reads the
11 affidavits and works on her cross, because we're not adjourning
12 the hearing.

13 MS. PREDOVAN: Your Honor, respectfully, I had a phone
14 conversation with Ms. Kinsley where she said she believed,
15 based on your order, indicating that Rule G doesn't apply in
16 these cases until you say so --

17 THE COURT: Excuse me. I don't believe what I'm
18 hearing. At every trial or hearing in front of me where I ask
19 for affidavits, and I did, you're to exchange them, also the
20 exhibits. You're to exchange them. It's not a secret. It's
21 the direct testimony. She's supposed to cross-examine your
22 witnesses. You're supposed to cross-examine her witnesses.
23 I've never heard anything so idiotic in my life.

24 MS. PREDOVAN: In addition, your Honor --

25 THE COURT: And if you were under any misapprehension,

F8IHGOMH

Hearing

1 a simple call to chambers would have cleared it up.

2 MS. PREDOVAN: If we had been able to open her
3 affidavits, however, they were sealed when we tried to open
4 them on ECF, it would have alerted us to our error. I
5 understand --

6 THE COURT: Why were they sealed?

7 MS. PREDOVAN: Your Honor, I don't know.

8 THE COURT: Do you know why they were sealed?

9 MS. KINSLEY: No, I filed them under the trial
10 documents docket and witness list and exhibit -- trial exhibits
11 and my -- I know my cocounsel, Mr. Silver, was able to open
12 them that way.

13 THE COURT: And did anybody --

14 MS. KINSLEY: No, I was not asked --

15 THE COURT: Sarah, can you open them?

16 THE DEPUTY CLERK: Yes.

17 THE COURT: We can open them. They're not filed under
18 seal. They're not sealed. They aren't sealed, because if they
19 were sealed, even we couldn't open them. We'd have to go to
20 the clerk's office and get a copy.

21 MS. PREDOVAN: Respectfully, your Honor, not only
22 myself but other attorneys at my office attempted to open
23 the --

24 THE COURT: Fine. You've got a problem with your
25 computer.

F8IHGOMH

Hearing

1 MS. PREDOVAN: And for that I apologize.

2 THE COURT: Did you call? Did you alert anybody? I
3 came back to town to hold this hearing. This is when the
4 hearing is going to be held. But I'm telling you, we're going
5 to sit here and give her time. I'm just going to sit here on
6 the bench. You're going to sit here. We'll all sit here in
7 silence, and you're going to give her time.

8 MS. PREDOVAN: Your Honor, I would respectfully
9 request that we also receive a copy of her affidavits as well.
10 We're happy to remedy any error on our part. And we do
11 apologize both to the Court and to --

12 THE COURT: You don't have her affidavits because you
13 couldn't get into ECF?

14 MS. PREDOVAN: That's correct.

15 THE COURT: Sarah, would you give them a copy of the
16 affidavit.

17 Fine. I'll tell you what we're going to do. The
18 affidavits are here, but you're going to put your client on the
19 stand. She's going to testify. Okay. We're going to listen
20 to direct. We're going to listen to direct. We're not going
21 to have lunch, folks. We're going to be here all day until
22 we're done, and the hearing should have taken an hour and a
23 half. Put your client on the stand.

24 MR. ROTH: Your Honor, ultimately, as a partner in the
25 firm, it's my fault. I apologize. What I would suggest is

F8IHGOMH

Hearing

1 that what happened was that --

2 THE COURT: I don't care what happened. I'm wasting
3 time.

4 MR. ROTH: Okay. So what I'm saying is I think that
5 if we read the affidavits, it will be five minutes, and then
6 you won't have to take -- everything I've done I've designed so
7 it would take you as little time as possible. I've cut down --
8 I've pared down everything.

9 THE COURT: I think I'm the only person in the room
10 who's read all the affidavits.

11 MR. ROTH: That's true.

12 THE COURT: Now, this might not be such a bad thing,
13 since I'm the one who's going to make the decision, but I think
14 I'm the only person in the room who's read all the affidavits.
15 Okay.

16 MR. ROTH: What we're saying, if you give us ten
17 minutes --

18 THE COURT: Read the affidavits. They're not that
19 complicated.

20 (Recess)

21 THE COURT: Okay. Have we all read these very
22 complicated affidavits?

23 MR. ROTH: Yes, your Honor.

24 MS. KINSLEY: Your Honor, I have read the affidavits.
25 I did notice that one of them is from a handwriting expert, and

F8IHGOMH

Hearing

1 for purposes of preserving the record, I would like to move to
2 strike the handwriting expert's testimony. The other two
3 witnesses are a different story. I can read their affidavits
4 and comprehend them. But I am certainly not a handwriting
5 expert, nor have I had an opportunity to consult with my own
6 expert to help me understand the testimony that the
7 plaintiffs' expert intends to present. And for that reason, I
8 feel that I have been ambushed and prejudiced by submission of
9 that affidavit and, for the record, would move to strike his
10 testimony.

11 THE COURT: Fine. The motion is denied. You read the
12 affidavit. He doesn't testify much about handwriting.

13 Okay. Call your first witness.

14 MR. ROTH: Your Honor, I just have one point of order.
15 There's various witnesses in the courtroom. Do you want them
16 to stay or to leave?

17 THE COURT: Are you making a motion to exclude? I
18 can't exclude a party.

19 MR. ROTH: Right. So --

20 THE COURT: Are there any nonparty witnesses in the
21 room?

22 MR. ROTH: Yes. Ms. Picciochi, our handwriting
23 expert; technically, Mr. Barnes is also not a party.

24 THE COURT: No, he's not a party. Okay. Anybody
25 who's not a party to the case should leave. There's a witness

F8IHGOMH

Carrasco - direct

1 room right outside that door and to the right.

2 Call your first witness.

3 MR. ROTH: Okay. Plaintiff calls Ms. Carrasco.

4 THE COURT: Why are we calling Ms. Carrasco? I
5 thought that she conceded that she signed --

6 MR. ROTH: She has an affidavit that she's submitted,
7 declaration. Basically, to authenticate her documents.

8 THE COURT: Come on up, Ms. Carrasco.

9 THE DEPUTY CLERK: You can step into the box. Stay
10 standing and raise your right hand, please.

11 YASHIRA CARRASCO,

12 a plaintiff, called as a witness on her own behalf,

13 having been duly sworn, testified as follows:

14 MR. ROTH: Your Honor, she has submitted a
15 declaration. Pursuant to your rules, I don't know if you want
16 me to --

17 THE COURT: What you should do is show it to her.
18 It's already been marked. Show it to her and ask her if that's
19 her testimony.

20 DIRECT EXAMINATION

21 BY MR. ROTH:

22 Q. Okay. I'm showing you Plaintiffs' Exhibit 2-1 through 3.
23 Please take a look at that.

24 THE COURT: Let's start with Plaintiffs' Exhibit 2.
25 Plaintiffs' Exhibit 2 is the affidavit; right?

F8IHGOMH

Carrasco - direct

1 MR. ROTH: The declaration, yes.

2 THE COURT: Okay. Ma'am -- says affirm. Does she
3 have a copy of that of the affidavit? Does she have a copy of
4 that?

5 MR. ROTH: Who's "she"?

6 THE COURT: Ma'am --

7 MR. ROTH: Yes, she's holding on to it right now.

8 THE COURT: -- there's an affidavit there. Says
9 affidavit of Yashira Carrasco.

10 THE WITNESS: Yes.

11 THE COURT: Are you familiar with the contents of that
12 document?

13 THE WITNESS: Yes.

14 THE COURT: Is that your testimony?

15 THE WITNESS: Yes.

16 THE COURT: Okay. Thank you. Submitted.

17 BY MR. ROTH:

18 Q. Ms. Carrasco, did you fill out an employment application
19 when you first began working at Lace?

20 A. Yes.

21 THE COURT: You don't get to --

22 MR. ROTH: It's not part of the -- anything I'm asking
23 right now is not part of her affidavit.

24 THE COURT: I know, but it should have been part of
25 her affidavit.

F8IHGOMH

Carrasco - direct

1 MR. ROTH: Your Honor, I didn't -- quite frankly.

2 THE COURT: Never mind. Go ahead. Just go ahead. It
3 will be faster if you just ask.

4 MR. ROTH: Okay.

5 THE COURT: Let me ask you a question. The lady says
6 in her affidavit she affirms under oath that she signed an
7 arbitration agreement. Are you, nonetheless, pressing her
8 claim that she is not required to arbitrate?

9 MR. ROTH: No, your Honor.

10 THE COURT: In that case, she has no relevant
11 testimony.

12 MR. ROTH: It's relevant because unless you'll accept
13 the documents as authenticated because her signature's on here,
14 her signature's on there, there's various documents that are
15 going to come into question by the document examiner, and I
16 need her sworn testimony to authenticate these documents.

17 THE COURT: Document examiner's not going to be
18 allowed to testify about her document because --

19 MR. ROTH: It's a comparison between her document and
20 the other documents that are important to this case, your
21 Honor.

22 THE COURT: I doubt it very much.

23 MR. ROTH: I promise.

24 THE COURT: I doubt it very much.

25 MR. ROTH: It's going to take two minutes.

F8IHGOMH

Carrasco - direct

1 THE COURT: Two minutes.

2 BY MR. ROTH:

3 Q. I want to show you what's Plaintiffs' Exhibit B-3 and 4.

4 Could you please take a look at. Please tell me what that is.

5 A. This is the application.

6 Q. Is that your handwriting on there?

7 A. Yes.

8 Q. Is that your signature?

9 A. Yes.

10 Q. Did you fill it out?

11 A. Yes.

12 Q. At your initial employment, were you given that document?

13 Is that how you got your employment?

14 A. Yes.

15 MR. ROTH: Your Honor, I move to have that admitted
16 into evidence.

17 THE COURT: Admitted.

18 MR. ROTH: Okay. Thank you.

19 (Plaintiffs' Exhibits B-3 and B-4 received in
20 evidence)

21 BY MR. ROTH:

22 Q. I'm going to what's been marked as Plaintiffs' B-1 and B-2.

23 Take a look at. At some point in time after your initial
24 employment, were you asked to sign additional documents?

25 A. Yes.

F8IHGOMH

Carrasco - direct

1 Q. Okay. Is that the document that you were asked to sign in
2 your hand?

3 A. Yes.

4 Q. Looking at this second page of that document, is that
5 document -- is that your handwriting on there and your
6 signature?

7 A. Yes.

8 Q. Underneath your name, whose handwriting is that?

9 A. Mine.

10 MR. ROTH: I move to admit that into evidence.

11 THE COURT: You offer it. You offer it.

12 MR. ROTH: I offer it into evidence.

13 THE COURT: It's admitted.

14 (Plaintiffs' Exhibits B-1 and B-2 received in
15 evidence)

16 BY MR. ROTH:

17 Q. Who gave you that agreement?

18 A. My manager.

19 Q. What was your manager's name?

20 A. Phil.

21 Q. Okay. Before did you see a man here who was also a manager
22 there?

23 A. No.

24 Q. Did you notice him? Where's the manager's office in Lace?

25 A. Downstairs.

F8IHGOMH

Carrasco - cross

1 Q. Okay. In the seven months you worked there, how often
2 would you go into the manager's office?

3 A. A lot.

4 Q. When you went down there, was there a manager in there?

5 A. Yes.

6 Q. Did you fit in that manager's office with the other
7 manager?

8 A. Yes.

9 Q. So just tell me the configuration, where would the manager
10 be, where would you be?

11 A. He'd be on the chair. I'd be standing next to the table.

12 MR. ROTH: Okay. That's it. Thank you, your Honor.

13 Oh, wait, you know what, I have one -- one other
14 question. Nope. No, I don't. Thank you.

15 THE COURT: Ma'am.

16 CROSS-EXAMINATION

17 BY MS. KINSLEY:

18 Q. Ms. Carrasco, this may seem like a very obvious question
19 for you, but you are not Jacqueline Gomez, are you?

20 A. No.

21 Q. You did not sign Jacqueline Gomez's arbitration agreement,
22 did you?

23 A. No.

24 MS. KINSLEY: I have no further questions.

25 THE COURT: Thank you, ma'am, you can go home.

F8IHGOMH

Gomez - direct

1 THE WITNESS: Thank you.

2 (Witness accused)

3 MR. ROTH: Leave them up there.

4 Call my next witness. Jacqueline Gomez.

5 THE DEPUTY CLERK: You can come up. When you get into
6 the box, just stay standing for a minute and raise your right
7 hand.

8 JACQUELINE GOMEZ,

9 a plaintiff, called as a witness on her own behalf,

10 having been duly sworn, testified as follows:

11 MR. ROTH: Your Honor, I'm going to show the witness
12 her affidavit that she submitted.

13 THE COURT: That's Plaintiffs' Exhibit 1, I believe.

14 MR. ROTH: Plaintiffs' Exhibit 1.

15 DIRECT EXAMINATION

16 BY MR. ROTH:

17 Q. Could you take a look at it, please.

18 Have you read the contents of that?

19 A. Yes.

20 Q. Is that true and accurate and is that your statement in
21 that testimony in this case?

22 A. Yes.

23 MR. ROTH: Okay. I move -- submit.

24 THE COURT: "Offer" is the word. The verb is offer.

25 MR. ROTH: I offer it into evidence.

F8IHGOMH

Gomez - direct

1 THE COURT: It's admitted.

2 (Plaintiffs' Exhibit 1 received in evidence)

3 THE COURT: I have read it.

4 BY MR. ROTH:

5 Q. Now, I'm going to ask you, when did you start working at
6 Lace, approximately?

7 A. May 2014.

8 Q. What was your position?

9 A. Waitress.

10 Q. When you first got there, did you have to fill out some
11 paperwork?

12 A. Correct.

13 Q. I'm going to show you what's been marked as A-3 and 4,
14 application for employment. I want to show you that.

15 MS. KINSLEY: Your Honor, I have not been provided
16 copies of the exhibits that are attached to this affidavit.

17 THE COURT: I don't understand. You said you got the
18 exhibits yesterday.

19 MS. KINSLEY: That --

20 THE COURT: Here. Why don't you just take my copies.

21 MS. PREDOVAN: If I could correct something, your
22 Honor. It's not an exhibit. It's page 2 and 4 of what is
23 premarked as Plaintiffs' Exhibit A. Our apologies for any
24 confusion.

25 MR. ROTH: You should have it.

F8IHGOMH

Gomez - direct

1 MS. KINSLEY: Exhibit A?

2 MR. ROTH: It's her employment application that you
3 gave us.

4 MS. PREDOVAN: Counsel misspoke when he said that it
5 was A.

6 THE COURT: Fine, fine, fine.

7 MS. KINSLEY: I've located it, your Honor. Thank you.

8 BY MR. ROTH:

9 Q. Okay. Did you fill out this document?

10 A. Yes.

11 Q. Whose handwriting's on it?

12 A. Mine.

13 Q. Who filled it out?

14 A. I did.

15 Q. Whose signature?

16 A. Mine.

17 Q. And the printing, the printing part of it, who did that?

18 A. I did.

19 MR. ROTH: I offer that into evidence.

20 THE COURT: It's admitted.

21 (Plaintiffs' Exhibits A-2 and A-3 received in
22 evidence)

23 BY MR. ROTH:

24 Q. What was your position when you worked at Lace?

25 A. Waitress.

F8IHGOMH

Gomez - direct

1 Q. How many days a week did you work there in September 2014?

2 A. One.

3 Q. How did you become aware that Lace started having employees
4 sign arbitration agreements?

5 A. Yashira told me.

6 I'm sorry. What was your question?

7 Q. I said how did you become aware that Lace started having
8 employees sign arbitration agreements?

9 A. Yashira told me.

10 Q. Okay. When for the first time were you approached and
11 asked to sign an arbitration agreement?

12 A. October 3.

13 Q. What happened on October 3?

14 MS. KINSLEY: Your Honor, I object to that testimony.
15 It was not provided in the witness statement.

16 THE COURT: Oh, sit down.

17 Answer the question, ma'am.

18 THE WITNESS: I'm sorry. What was your question?

19 THE COURT: What happened on October 3?

20 THE WITNESS: I went in to go pick up my check. I had
21 surgery that morning, and I went to pick up my check. And then
22 Mario said, You have to sign this paper. And I said, What's
23 that? And he said, It's arbitration. It's --

24 THE COURT: Slow down a little bit. This poor lady,
25 she's trying to take down everything you say.

F8IHGOMH

Gomez - direct

1 THE WITNESS: I'm so sorry.

2 THE COURT: I know you're nervous. I've actually done
3 what you're doing, so slow down.

4 THE WITNESS: Okay. So he said it was an arbitration
5 agreement, somewhat illegal. So I said, I don't have time for
6 that right now. I took my check and I took the paper, and I
7 just left.

8 BY MR. ROTH:

9 Q. Okay. Now, what happened to the arbitration agreement that
10 he gave you?

11 A. I have no idea. I didn't do anything with it because I
12 didn't work to work no time after soon after.

13 Q. I'm going to showing you what's marked as Plaintiffs'
14 Exhibit A-1 and A-2. Take a look at that. When had you seen
15 this agreement filled out for the first time?

16 A. When I went to my lawyer's office.

17 Q. When you came to my office?

18 A. Correct.

19 Q. On that document, looking at the second page, did you sign
20 that?

21 A. Not at all.

22 Q. Okay. How do you know that you didn't sign that?

23 A. For starters, my name is misspelled. And when my name is
24 misspelled, I correct it automatically. My dates are wrong. I
25 never write my dates like this. It's not my handwriting at

F8IHGOMH

Gomez - direct

1 all. My signature's pretty simple, but it's not my signature
2 at all.

3 Q. Okay. Now, on the 27th, where were you?

4 A. I was at a birthday party with my daughter and her friend.

5 Q. Let me show you what's been marked as Plaintiffs' Exhibit s
6 J-1 and J-2. Can you tell me what that document is.

7 A. It's a blank arbitration agreement.

8 Q. All right. When did you get that agreement?

9 A. In January.

10 Q. Of what year?

11 THE COURT: I don't have this.

12 MR. ROTH: J-1 and J-2?

13 THE COURT: I don't have this.

14 MS. PREDOVAN: Your Honor, this was hand-delivered to
15 your chambers yesterday. We at first had the opportunity to
16 examine the original documents --

17 THE COURT: All I said was I don't have it. Where's
18 my copy?

19 MS. PREDOVAN: Your Honor, I'll happily provide you
20 one.

21 THE COURT: This is J-2 also.

22 BY MR. ROTH:

23 Q. Where did this come from?

24 A. It was sent to me.

25 Q. Okay.

F8IHGOMH

Gomez - cross

1 THE COURT: It was what?

2 THE WITNESS: Sent over to me.

3 THE COURT: It was sent over to you?

4 THE WITNESS: Yes.

5 BY MR. ROTH:

6 Q. What month was that?

7 A. January 2015.

8 Q. Generally, when you got paid by Lace was that by check or
9 some other means?

10 A. It was by check.

11 Q. And would you endorse your signature on the back of those
12 checks?

13 A. Correct.

14 MR. ROTH: Okay. Your Honor, no further questions.

15 THE COURT: Okay. Cross.

16 CROSS-EXAMINATION

17 BY MS. KINSLEY:

18 Q. Ms. Gomez, you previously worked at the Penthouse Club on
19 45th Street; is that correct?

20 A. Correct.

21 Q. Were you required to sign an arbitration agreement at that
22 establishment?

23 A. No.

24 Q. You continued to work as an employee of MLB Enterprises
25 until January of this year; is that right?

F8IHGOMH

Gomez - cross

1 A. Correct.

2 Q. Were you ever advised that it was a corporate policy that
3 you could not continue to work if you had not signed an
4 arbitration agreement?

5 A. No.

6 THE COURT: You need to wait till she's done with the
7 question before you answer.

8 Q. I'd like to ask you to pick up the signed arbitration
9 agreement that is in front of you. I believe it's Exhibit A to
10 your affidavit. Do you see that?

11 A. Yes.

12 Q. You have identified the print underneath your signature as
13 not yours; is that right?

14 A. Correct.

15 Q. You have no knowledge of when that print was placed on that
16 document, do you?

17 A. No.

18 Q. You've made some assertions that you would have corrected
19 it if it was there when you signed it; is that right?

20 A. I never signed the document.

21 Q. You've made an assertion. I asked you if you've made an
22 assertion.

23 THE COURT: You did say you would have corrected it --

24 THE WITNESS: Correct.

25 THE COURT: -- if you had seen it?

F8IHGOMH

Gomez - redirect

1 THE WITNESS: Correct. Sorry.

2 BY MS. KINSLEY:

3 Q. If it had not been there when you signed it, you could not
4 have corrected it; right?

5 THE COURT: I think you should use the word "see"
6 instead of "saw" because the lady says she never signed the
7 agreement. Now, I get to decide whether she did or she didn't.
8 But for the purpose of cross-examining, it will go more
9 fruitfully if you talk about when she saw the document.

10 If you would have seen this, you would have corrected
11 it?

12 THE WITNESS: Correct.

13 THE COURT: Are you telling me you didn't see this?

14 THE WITNESS: No, I never signed the document. When I
15 saw this is when I went to my attorney.

16 THE COURT: When you saw this is when you went to your
17 attorney?

18 THE WITNESS: Correct.

19 MS. KINSLEY: I have no further questions, your Honor.

20 THE COURT: Okay.

21 MR. ROTH: One redirect.

22 REDIRECT EXAMINATION

23 BY MR. ROTH:

24 Q. The part you said you would correct and cross out would be
25 what?

F8IHGOMH

Picciorchi - direct

1 A. Would be my name.

2 Q. What's wrong with your name on that document?

3 A. It's misspelled. It's J-a-c-q-u-e-l-i-n-e, and it's
4 missing the "E."

5 MR. ROTH: Okay. No further questions.

6 THE COURT: Okay. Thank you. Do you want these two
7 pieces of paper in evidence, J-1 and J-2?

8 MR. ROTH: Oh, yes, your Honor.

9 THE COURT: Fine. They are.

10 (Plaintiffs' Exhibits J-1 and J-2 received in
11 evidence)

12 MR. ROTH: I call as my next witness Mr. Picciorchi.

13 THE COURT: Okay.

14 MR. ROTH: I've got to get him. Sorry. Your Honor,
15 I'm going to use blowups with him. I just made blowups of the
16 documents.

17 THE COURT: Just get the witness.

18 MR. ROTH: Okay.

19 RICHARD PICCIORCHI,

20 called as a witness by the Plaintiffs,

21 having been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. ROTH:

24 Q. All right. I'm going to show you your declaration.
25 Plaintiffs' Exhibit 3, take a look at that.

F8IHGOMH

Picciochi - direct

1 You familiar with that document?

2 A. Yes, sir.

3 Q. Is everything in there true and accurate, and do you adopt
4 it as your testimony in this case?

5 A. Yes.

6 MR. ROTH: I offer that.

7 THE COURT: It's admitted.

8 (Plaintiffs' Exhibit 3 received in evidence)

9 BY MR. ROTH:

10 Q. Mr. Picciochi, I'm going to also show you your CV,
11 Plaintiffs' Exhibit E. Take a look at that.

12 Is that your CV containing all of your professional
13 qualifications?

14 A. Yes, sir.

15 MR. ROTH: Okay. I offer that.

16 THE COURT: It's admitted.

17 (Plaintiffs' Exhibit E received in evidence)

18 BY MR. ROTH:

19 Q. Okay. Can you explain your profession, Mr. Picciochi.

20 A. I'm a questioned document examiner, also known as a
21 forensic document examiner.

22 Q. And what is that?

23 A. A questioned document examiner is one who examines
24 handwriting and anything on a document that may be in question.

25 Q. By whom are you currently employed?

F8IHGOMH

Picciochi - direct

1 A. I am currently self-employed.

2 Q. Before you were self-employed, for whom were you employed?

3 A. I was employed by New York City Police Department as a
4 questioned document examiner for approximately 20 years in
5 crime laboratory's questioned document section as a detective
6 and technical supervisor of the questioned document unit.

7 Q. Have you received any specialized training to become a
8 questioned document examiner?

9 A. Yes, sir.

10 Q. What was that?

11 A. I have received three years of apprenticeship training from
12 the New York City Police Department, from the Federal Bureau of
13 Investigation, and the United States Secret Service. The
14 training included formal lectures, practical exercises, written
15 tests and oral presentations. I supplemented that training by
16 attending workshops and symposia and studied under private
17 document examiners while also taking college courses in
18 handwriting and document examinations.

19 Q. How much of your time now is devoted to the study and
20 examination of such matters?

21 A. That is my full-time career.

22 Q. How many documents have you examined over the course of
23 your career?

24 A. Thousands and thousands of documents.

25 Q. Do you teach any courses in forensic document examining?

F8IHGOMH

Picciochi - direct

1 A. Yes, I have taught at CUNY at a City University of New York
2 John Jay College of Criminal Justice, and more recently, at
3 Hofstra University in Long Island in their forensic science
4 department.

5 Q. Has any court ever disqualified you when you've been
6 attempted to be admitted as an expert?

7 A. I've qualified each and every time.

8 MR. ROTH: Your Honor, I offer Mr. Picciochi as an
9 expert.

10 MS. KINSLEY: No objection, your Honor.

11 THE COURT: Any voir dire?

12 MS. KINSLEY: -- subject to my prior objection.

13 THE COURT: I understand.

14 BY MR. ROTH:

15 Q. Okay. Mr. Picciochi, in those cases where you had an
16 original questioned document and had an original exemplar
17 document and you were asked to determine the genuineness of an
18 original document, were you ever unable to offer an opinion
19 either way?

20 A. Document or handwriting or both?

21 Q. Document.

22 A. Generally, when you have standards, then I can make a
23 comparison and reach an opinion.

24 Q. In this matter were you given an assignment?

25 A. Yes, sir.

F8IHGOMH

Picciochi - direct

1 Q. What was your assignment?

2 A. To examine the signature on an arbitration document for
3 Jacqueline Gomez and also to look at the document itself and
4 determine if it was genuine or spurious in nature.

5 Q. Okay. Did you have anything to compare it with?

6 A. Yes, I did.

7 Q. What was that?

8 A. I had numerous exemplars of Ms. Gomez's signature, and I
9 also had Ms. Carrasco's arbitration agreement to do a
10 comparison of the documents.

11 Q. I'm going to show -- when you were asked for this
12 assignment, what's the first thing you did?

13 A. I looked at the sufficiency of the materials that were
14 provided.

15 Q. What was the first thing that you requested?

16 A. I requested access to the original questioned document.

17 Q. What did you come to learn?

18 A. That it was unavailable.

19 Q. That the original -- that the original of the Gomez
20 arbitration agreement was unavailable?

21 A. That is correct.

22 Q. What was the next thing you did to analyze the documents?

23 A. I studied the features within the questioned signature to
24 determine if there was sufficient characteristics to reach a
25 conclusion.

F8IHGOMH

Picciochi - direct

1 Q. As far as the signatures went, what were you able to
2 conclude about the signature on the copy?

3 A. That the signature was reproduced with very low resolution
4 and that it lacks much detail necessary for a complete
5 examination; that is, there are no letter forms, no letter
6 designs or formations, there are no relationships between
7 letters, and I was not able to look at the movement
8 characteristics in the signature from the copy.

9 Q. How were you inhibited from doing a complete and full
10 analysis by not having the original?

11 A. Having the original, I would be able to look at the most
12 important characteristics in a signature, which is how it is
13 formed; how the pen moved through space and time, that is,
14 pressure, pressure variation, speed, tremor, lack of tremor,
15 flying starts and stops in the signature. So these
16 characteristics were skewered, which is a severe limitation to
17 the analysis.

18 Q. The issue with her signature is, just generally, in lay
19 terms, it's just too easy to duplicate; is that fair to say?

20 A. It is definitely an illegible and very simple signature and
21 can readily be simulated or imitated.

22 Q. Okay. I'm going to show you -- your Honor, I made blowups
23 for demonstrative purposes. Is that all right if we use them?

24 THE COURT: Sure.

25 Q. Okay. So I'm going to show you two blowups. Have you seen

F8IHGOMH

Picciochi - direct

1 these blowups before, these two blowups?

2 A. I have not.

3 Q. Okay. Have you seen the documents that these came from?

4 A. Yes, sir.

5 Q. Okay. Would it be fair to say one of these is the
6 purported Gomez arbitration agreement and the other one is the
7 Carrasco arbitration agreement; is that correct?

8 A. That is correct, sir.

9 Q. Okay. Just looking at the Gomez arbitration, what could
10 you tell about that document by itself in comparison to other
11 exemplars of Ms. Gomez?

12 A. In terms of signature?

13 Q. The signature and the handwriting.

14 A. That there is a signature that is not complex. And if you
15 look closely at it, especially under stereomicroscope with
16 various lighting, you would notice that it is distorted and
17 digitized, much like pixilation. So the line quality of the
18 signature is obscured so I cannot see how it was made, no
19 indication of speed and naturalness in the person's writing.

20 Q. Now, looking -- I'm sorry. The document's up there -- at
21 Plaintiffs' Exhibit A-3 and A-4, this is the Gomez employment
22 application, have you seen that document before?

23 A. I have, sir.

24 Q. Okay. What can you tell from looking at that employment
25 application, as well as -- I know you've seen other

F8IHGOMH

Picciocchi - direct

1 documents -- and the handwriting underneath the signature on
2 this document?

3 A. The hand printed name, Jacqueline Gomez, on the questioned
4 document is missing one letter, the letter "E" in Jacqueline
5 before the "L"; that is, "E" is present in the application. So
6 the spelling of the name is different.

7 Q. Now, even though this is a copy, are you able to tell from
8 looking at the hand printing how -- if it's similar or
9 different from Ms. Gomez?

10 A. I am because the hand printing is much more complex and
11 contains recognizable letter forms and therefore proportions,
12 height, spacing, and other characteristics that I can use for
13 comparison.

14 Q. Can you offer an opinion as to whether that is her
15 handwriting?

16 A. It is not consistent with the known writings; and,
17 therefore, it's my expert opinion that the hand printing below
18 the questioned signature is not that of Ms. Gomez.

19 Q. What about the date? What's the difference between the way
20 the date's written there and the date that you have seen her
21 write on other documents?

22 A. Ms. Gomez, in her known writings, always uses slashes
23 between the numbers in the dates. The questioned document has
24 dots and not slashes.

25 Q. Okay. Now I'm going to hold the blowup. Hopefully, it

F8IHGOMH

Picciochi - direct

1 won't fall down.

2 THE COURT: I can't find her employment application.
3 I had it. I wrote on it.

4 MR. ROTH: We have extras.

5 THE WITNESS: Do you want my copy?

6 THE COURT: I want my copy because I have notes on it.

7 MR. ROTH: I have an extra, your Honor.

8 THE COURT: No, no. It's here. It's behind Exhibit
9 A. I was looking at it separately.

10 MR. ROTH: I apologize.

11 THE COURT: All right. Thank you.

12 BY MR. ROTH:

13 Q. Now, looking at the signature page on the Carrasco
14 arbitration agreement, which she did admit to signing, can you
15 tell any differences between the Carrasco arbitration agreement
16 and the agreement that Jacqueline Gomez purportedly signed?

17 A. Yes. The printed matter on both documents are -- is
18 somewhat different. In particular, if you look on the right
19 side of both forms, the MLB -- I can't quite read.

20 Q. MLB?

21 A. Yes, MLB line is in brackets.

22 Q. So here it's in brackets?

23 THE COURT: I can see that.

24 THE WITNESS: Correct.

25 THE COURT: I don't need a questioned documents expert

F8IHGOMH

Picciochi - direct

1 to tell me that.

2 BY MR. ROTH:

3 Q. Okay. So, obviously, there's a whole bunch of other
4 differences between these two documents, and I agree with your
5 Honor that I'm not going to go through them all. But what
6 about these two documents is significant that it would take a
7 questioned document examiner to notice?

8 A. The signature of Capeci and the printed name, his title,
9 and the date are virtually identical. And due to natural
10 variation within a person's writing, we are not machines, it is
11 unlikely that a person can write virtually the same each and
12 every time. They can basically be superimposed with each
13 other.

14 Q. So you're saying that the two signatures by Capeci, that
15 they don't have a natural variation that you would find in
16 anybody's handwriting?

17 A. Most people's writings have some sort of variation, yes.

18 Q. Now, we've previously provided you with Plaintiffs'
19 Exhibit F, which was a licensing agreement. I'm going to show
20 you that. And the last page, which we're going to be looking
21 at, is F-5.

22 Have you seen this document before? And look at the
23 signature page on that document that's F-5.

24 A. Yes, I have seen this document before.

25 Q. Okay. Is Mr. Capeci's signature on that document, F-5?

F8IHGOMH

Picciochi - direct

1 A. It is, along with the printing.

2 Q. Okay. When you're looking at the signature on that, can
3 you describe what natural variation is there? Is there a
4 natural variation between that signature and the signature you
5 see on either of these two arbitration agreements?

6 A. Yes. The signature and the hand printing are not identical
7 to the signature and printing on both the Carrasco and Gomez
8 signatures.

9 Q. But they're close enough that you as a -- as somebody who
10 can analyze handwriting can say that it is his signature on
11 both?

12 A. Yes.

13 Q. On the F-5 that you're looking at as well as these two
14 documents; is that correct?

15 A. That is correct, sir.

16 Q. Other than what you've already described, in what other way
17 were the plaintiffs unable to -- what other analysis was not
18 available to the plaintiffs that would have been relevant here
19 that you could have recommended to us had we had an original?

20 A. Two major examinations, the examination of the paper itself
21 and the examination of the inks for relative and absolute
22 dating.

23 Q. Okay. What is the ink? What is that?

24 A. Well, first of all, from a copy I cannot even tell how that
25 signature was applied, whether a writing instrument, is it

F8IHGOMH

Picciochi - direct

1 toner, is it transferred, is there embossing, what type of
2 writing instrument it might be. I cannot tell if there are any
3 guidelines. I cannot tell anything from the paper itself. If
4 it had the same fluorescence, same physical qualities in terms
5 of tint or thickness. And in terms of the ink, since they are
6 two contemporaneous forms, both appear to be signed the same
7 date, 9/27/2004 --

8 Q. '14.

9 A. -- not myself, but an ink chemist, can do a relative ink
10 dating to see if they are consistent with being prepared at the
11 same time.

12 Q. So just to sum up, as a professional document examiner, as
13 far as the Gomez arbitration agreement goes, knowing that
14 Ms. Carrasco admitted to making the signature, what questions
15 would you have for those that have remained unanswered at this
16 time?

17 A. Basically, I'd like to see the original of the questioned
18 Gomez so I can compare or have available an ink chemist to do a
19 comparison, but I can also do an examination of the paper
20 itself.

21 Q. But you would agree, without question, that because the
22 signatures on both documents are so similar that that raises
23 questions about the genuineness of the Gomez arbitration?

24 MS. KINSLEY: Objection. Leading.

25 THE COURT: The objection is sustained.

F8IHGOMH

Picciochi - cross

1 MR. ROTH: Okay. No further questions, your Honor.

2 THE COURT: If you'd like to testify, I'd be happy to
3 swear you.

4 MR. ROTH: No further questions, your Honor.

5 THE COURT: Cross.

6 MS. KINSLEY: Your Honor, just so the record's clear,
7 I want to proffer two actions I would have taken had I known
8 about Mr. Picciochi's -- I hope I'm pronouncing that right --
9 testimony prior to this morning. I would have sought the
10 assistance of my own questioned exam -- questioned document
11 examiner, and I also would have requested handwriting exemplars
12 of Ms. Gomez that Mr. Picciochi referenced in his testimony.

13 THE COURT: Let's find out what they are.

14 CROSS-EXAMINATION

15 BY MS. KINSLEY:

16 Q. Let's start there, Mr. Picciochi. You referenced that you
17 had numerous exemplars of Ms. Gomez's handwriting. Can you
18 state the origin of each of those exemplars and when you
19 acquired it.

20 THE COURT: They have to be shown. In case you aren't
21 familiar with the rules, when an expert testifies and says he
22 relied on something, your opponent has to have copies of
23 everything. That's why you see doctors come in with large
24 piles of textbooks in medical malpractice cases, because this
25 information has to be available for cross-examination.

F8IHGOMH

Picciocchi - cross

1 So why don't you hand me all the known exemplars. I
2 haven't seen anything.

3 MR. ROTH: Basically, the our retainer agreement and
4 consent.

5 THE COURT: This is it?

6 MR. ROTH: No, this is not it, your Honor. Those are
7 the only originals that we had because she didn't have -- she
8 didn't have other originals. But as far as the --

9 THE COURT: Sir, show me everything you looked at.

10 THE WITNESS: I have my own set of copies.

11 THE COURT: Fine. Here. Here. Please give these to
12 her. Give these to her. And we'll take time. I mean, I
13 really loathe having to teach evidence to lawyers who are
14 supposed to know what they're doing, but it's Evidence 101 that
15 when you have an expert witness, every document, article,
16 whatever that's the basis of his opinion, is to be tendered to
17 the other side. I'll probably end up striking his testimony,
18 not that I think it was particularly necessary.

19 (Pause)

20 MS. KINSLEY: Your Honor, may I mark these as
21 Defendants' Exhibit F?

22 THE COURT: You may. We'll make copies later.

23 MS. KINSLEY: May I approach the witness?

24 THE COURT: You may.

25 BY MS. KINSLEY:

F8IHGOMH

Picciochi - cross

1 Q. Mr. Picciochi, I'm showing you what we will mark for the
2 record as Defendants' Exhibit F. Would you take a moment and
3 look through those documents.

4 MR. ROTH: Your Honor, just to the extent that there's
5 any personal identifying information, if we could redact that
6 if that's going to be an issue?

7 THE COURT: I don't know that it's going to be an
8 issue.

9 Q. Do you recognize Defendants' Exhibit F?

10 A. Yes.

11 Q. Have you had a chance to review it?

12 A. Yes.

13 Q. I'd like to ask you some specific questions about the
14 documents in Defendants' Exhibit F. Do you see the top page
15 which has two lines of typed writing, a line that says
16 "accepted and agreed," a line that says "client," and then some
17 handwriting?

18 A. Yes.

19 Q. Would you agree with me that the signature contained on the
20 line "client" is an original?

21 A. Yes, ma'am.

22 Q. Looking at page 2 of Defendants' Exhibit F, the top of this
23 page says, "Consent to become a party plaintiff." Do you see
24 that?

25 A. Yes, ma'am.

F8IHGOMH

Picciochi - cross

1 Q. Then there's a paragraph of typed writing. Do you see
2 that?

3 A. Yes, ma'am.

4 Q. Then there's a blank line that says "signature" and a
5 signature on that line. Do you see that?

6 A. Yes, ma'am.

7 Q. Would you agree with me that that signature is an original?

8 A. Correct.

9 Q. So the record's clear, we're referencing page 2 of Exhibit
10 F?

11 A. Correct.

12 Q. Then we have a stack of what I would characterize as
13 personal documents, apartment leases, credit card agreements,
14 medical records, etc. Are you familiar with these documents?

15 A. Yes, ma'am.

16 Q. Do these documents purport to contain Jacqueline Gomez's
17 signature in some form?

18 A. Yes, they were submitted as known writings by her.

19 Q. Would you agree with me that each of the signatures on the
20 remaining documents in Defendants' Exhibit F, not pages 1 and
21 2, are copies?

22 A. That is correct.

23 Q. Do the documents in Defendants' Exhibit F comprise the
24 entirety of the handwriting exemplars that you compared
25 Jacqueline Gomez's signature to?

F8IHGOMH

Picciochi - cross

1 A. They are all the samples that I have, yes.

2 Q. Now, you indicated, I believe, that you were unable to
3 reach any conclusions or opinions about the authenticity of
4 Ms. Gomez's signature on the arbitration agreement; is that
5 correct?

6 A. That is correct.

7 Q. You did opine about the printing underneath Ms. Gomez's
8 signature on that document. Do you recall doing that?

9 A. I do.

10 Q. And your opinion about the print handwriting is different
11 from your opinion about the signature; correct?

12 THE COURT: He didn't have an opinion about the
13 signature.

14 Q. The opinion that you reached about the print handwriting --

15 THE COURT: You reached an opinion about the print; is
16 that correct?

17 THE WITNESS: Yes. Yes, ma'am.

18 THE COURT: And the fact that you reached an opinion
19 is different from the fact that you didn't reach an opinion
20 about the signature; is that correct?

21 THE WITNESS: Yes.

22 BY MS. KINSLEY:

23 Q. This ink test you mentioned, you did not perform that;
24 right?

25 A. No, I'm not an ink chemist, and an ink analysis cannot be

F8IHGOMH

Picciochi - cross

1 performed on toner.

2 Q. And a chemist did not perform that test either; right?

3 A. That is correct.

4 Q. You also mentioned that the resolution was very low on
5 Ms. Gomez's signature on the arbitration agreement; right?

6 A. Yes, ma'am.

7 Q. Were you aware that that document came from a PDF document?

8 A. No, I am not aware.

9 Q. Do you know in what way it came to be printed out on the
10 piece of paper that you saw? And I'm referencing Jacqueline
11 Gomez's arbitration agreement.

12 A. Well, when it was sent to me by e-mail attachment, yes, it
13 was a PDF.

14 Q. Scanners vary in the amount of resolution that they use to
15 create a PDF document; isn't that right?

16 A. They can.

17 Q. And computers vary in the way that they create PDF
18 documents in different resolutions; right?

19 A. Not so much the computer, but the printout device.

20 THE COURT: The printer?

21 THE WITNESS: Yes, ma'am.

22 MS. KINSLEY: I have no further questions, your Honor.

23 THE COURT: Thank you so much for coming.

24 THE WITNESS: Thank you.

25 (Witness excused)

F8IHGOMH

Barnes - direct

1 MS. KINSLEY: Your Honor, I would offer Defendants'
2 Exhibit F, and I apologize and do not have an exhibit sticker.

3 THE COURT: Don't worry about that. We can put an
4 exhibit sticker on it. We'll have to make a copy of it. And
5 yes, it's admitted.

6 (Defendants' Exhibit F received in evidence)

7 THE COURT: That's your evidence; right?

8 MR. ROTH: Yes, your Honor.

9 MS. KINSLEY: Your Honor, I call Mario Barnes. He's
10 in the witness room. May I get him?

11 THE COURT: Of course you may.

12 Good morning, Mr. Barnes. Won't you come up here,
13 sir.

14 MARIO BARNES,

15 called as a witness by the Defendants,

16 having been duly sworn, testified as follows:

17 THE COURT: Mr. Barnes, do me a favor. Lift up that
18 microphone just a little bit. Thank you so much, sir.

19 MS. KINSLEY: Your Honor, may I approach the witness?

20 THE COURT: You may.

21 DIRECT EXAMINATION

22 BY MS. KINSLEY:

23 Q. Mr. Barnes, I'm showing you what I've marked as Defendants'
24 Exhibit D. Do you recognize that document?

25 A. Yes, I do.

F8IHGOMH

Barnes - direct

1 Q. Is that a declaration that you signed for the purposes of
2 the hearing today?

3 A. Yes, it is.

4 Q. Does that contain your true and correct testimony?

5 A. Yes.

6 Q. I'm now showing you what I've marked as Defendants' Exhibit

7 A. Do you recognize that document?

8 A. Yes, I do.

9 Q. Is that the checklist that you referenced in your
10 declaration?

11 A. Yes.

12 Q. Does that document contain your handwriting?

13 A. Yes.

14 Q. Where?

15 A. Check marks on the right.

16 Q. I'm now showing you what I've marked as Defendants'
17 Exhibit B. Do you recognize that document?

18 A. Yes.

19 Q. Is Defendants' Exhibit B the Gomez arbitration agreement
20 that you reference in your declaration?

21 A. Yes.

22 MS. KINSLEY: I have no further questions, your Honor.

23 THE COURT: Thank you very much.

24 MS. KINSLEY: I would offer Defendants' Exhibit A, B,
25 and D into evidence.

F8IHGOMH

Barnes - cross

1 THE COURT: They are in evidence. Thank you.

2 (Defendants' Exhibits A, B, D received in evidence)

3 CROSS-EXAMINATION

4 BY MR. ROTH:

5 Q. Okay. Good morning, Mr. Barnes.

6 A. Good morning.

7 Q. You had your deposition taken last week; is that correct?

8 A. Yes.

9 Q. During that deposition you were asked various questions
10 about the fact that -- Defendants' Exhibit D?

11 A. Yes.

12 Q. Do you recall that?

13 You stated that the check marks on the right were the
14 arbitration agreements you collected; isn't that correct?

15 A. Yes.

16 Q. If the arbitration agreement, the check marks on the right,
17 weren't made, then you didn't collect them; is that correct?

18 A. Yes.

19 Q. Okay. The only way and the main way that you remembered
20 collecting any of these was by the check marks; correct?

21 A. Yeah, that's what you asked me.

22 Q. And you responded that --

23 THE COURT: The court reporter wanted to speak to the
24 witness. Speak up, sir.

25 Q. You stated that the check marks, people with the check

F8IHGOMH

Barnes - cross

1 marks, these were the people you collected the arbitration
2 agreements from?

3 A. Yes, I agree.

4 Q. Do you recall giving testimony also in that you
5 collected -- that there's some people who you gave the
6 arbitration agreements to, about 80 percent of them signed
7 right there, no hassle, and gave them back to you. Do you
8 remember that testimony?

9 A. Yes.

10 Q. I asked you who did you give it to and who did you get it
11 back from that, based on your recollection that you -- that
12 gave you no hassle, and you gave us a list of people. And in
13 that list of people, there were a person named Ronnie, who
14 doesn't seem to be on your checklist.

15 A. Yeah.

16 Q. Okay. Is that the same person on the checklist or is that
17 two Ronnies or something else?

18 A. May I see the name.

19 Q. Sure. I think you have it in front of you, D-1. Do you
20 have your list?

21 MS. KINSLEY: I have the exhibits.

22 MR. ROTH: Okay. I'm sorry. Here you go.

23 Your Honor, if I can approach the witness?

24 THE COURT: Sure.

25 BY MR. ROTH:

F8IHGOMH

Barnes - cross

1 Q. All right. This is the list.

2 THE COURT: Excuse me. Would you speak loudly enough
3 for the court reporter to take you down and for me to hear.

4 MR. ROTH: Okay.

5 Q. We're looking at D-1, and there's four -- five check marks
6 on the right-hand side. Those are yours; correct?

7 A. Yes.

8 Q. Okay. Then down here it says Ronald something. That's
9 Ronnie, is that correct, who worked at your club back then?

10 A. Yes.

11 Q. Okay. And he does not have a check mark; correct?

12 A. No.

13 Q. Okay. Do you recall giving, on page 54 of Exhibit I,
14 page 54 -- you don't have it -- but do you recall being asked
15 these questions and giving these answers:

16 "Q. How many people just signed it and gave it right back to
17 you or within a short, like, a couple of minutes?"

18 This is on page 53, line 18.

19 "A. I'd say about 80 percent.

20 "Q. Do you recall which of those people are?

21 "A. Yeah, for the most part, yeah."

22 At the top of 54.

23 "Q. So what are their names?

24 "A. Yvonne, Stacy -- Yvonne, Stacy, Stephanie, Betty. I'm
25 drawing a blank on all the workers right now. Carlos, Lewis.

F8IHGOMH

Barnes - cross

1 If I had a list, I could read them off to you perfectly. Let's
2 see. Kwame, Eric, couple of security that don't work there
3 anymore. I can't think of their names any. Daisy, Ricky,
4 Mayra, Anastasia, Christina, Christine -- excuse me, Christine,
5 Christina, Ronnie, Chris."

6 And you're saying they just signed it gave it back to
7 you; is that correct?

8 A. Yes.

9 Q. Now, you initially testified that you got a stack of
10 arbitration agreements, they were blank, you handed them out
11 blank, and they came back to you filled in; is that correct?

12 A. Yes.

13 Q. And they were all the same; correct?

14 A. Yes.

15 Q. Okay. You didn't change them, you didn't alter the
16 document, you didn't --

17 THE COURT: You are going so fast.

18 MR. ROTH: Sorry, Judge.

19 Q. You did not change them? You did not alter them?

20 THE COURT: That's three questions.

21 You did not change them; is that correct? Did you
22 make any changes?

23 THE WITNESS: No.

24 THE COURT: Did you make any alterations?

25 THE WITNESS: No.

F8IHGOMH

Barnes - cross

1 THE COURT: That's how you ask a question. Don't give
2 a speech. Ask a question.

3 BY MR. ROTH:

4 Q. Everybody got the same -- all the employees got the same
5 arbitration agreement; correct?

6 A. Yes.

7 Q. Once they were signed, then you put them out for Mr. Capeci
8 to sign, and you never saw them again; is that correct?

9 A. Yes.

10 Q. So when you got them, they're blank, they go to the
11 employee, they get signed, then they go up to the manager's
12 desk for Mr. Capeci; correct?

13 A. Yes, sir.

14 MR. ROTH: Okay. No further questions.

15 MS. KINSLEY: No redirect.

16 THE COURT: Thank you, sir. You may step down.

17 (Witness excused)

18 MS. KINSLEY: I would just remind Mr. Barnes that he's
19 subject to the exclusion. So he'll need to leave.

20 THE COURT: No, he's testified. He can stay now.
21 He's welcome to stay.

22 MS. KINSLEY: We call Anthony Capeci.

23 ANTHONY CAPECI,

24 called as a witness by the Defendants,

25 having been duly sworn, testified as follows:

F8IHGOMH

Capeci - direct

1 MS. KINSLEY: May I approach the witness, your Honor?

2 THE COURT: Yes, you may.

3 DIRECT EXAMINATION

4 BY MS. KINSLEY:

5 Q. Mr. Capeci, I am showing you what I've marked as
6 Defendants' Exhibit D. Do you recognize this document?

7 A. Yes.

8 Q. Does that document bear your signature on page 3?

9 A. Yes, it does.

10 Q. Is that a declaration that you previously entered into for
11 the purposes of this hearing today?

12 A. Yes.

13 Q. Does it contain your true and correct testimony?

14 A. Yes.

15 Q. I'm now showing you what I've marked as Defendants'
16 Exhibit B. Do you recognize that document?

17 A. Yes.

18 Q. Does that document contain your signature?

19 A. Yes.

20 Q. And is that the Gomez arbitration agreement that you
21 reference in your declaration?

22 A. Yes.

23 Q. I'm now showing you what I've marked as Defendants' Exhibit

24 C. Do you recognize that document?

25 A. Yes.

F8IHGOMH

Capeci - cross

1 Q. Is that the Gomez employment application that you reference
2 in your declaration?

3 A. Yes.

4 Q. Are Exhibit B and Exhibit C business records that you keep
5 in conjunction with your role as MLB Enterprises president?

6 A. Yes.

7 MS. KINSLEY: No further questions, your Honor. And I
8 offer Defendants' Exhibits C and E into evidence.

9 THE COURT: Admitted.

10 (Defendants' Exhibits C and E received in evidence)

11 MR. ROTH: Your Honor, in between the time that
12 Mr. Capeci testified, we got his original. I'd like to hand
13 that up to the Court so that it's the official transcript.

14 THE COURT: I don't need it.

15 MR. ROTH: Okay.

16 CROSS-EXAMINATION

17 BY MR. ROTH:

18 Q. Mr. Capeci, do you recall testifying --

19 A. Capeci.

20 Q. Capeci, I apologize. I think I made that mistake four
21 times at deposition. I apologize.

22 Would you agree that it was not the practice of MLB
23 Enterprises at Lace to make any copies of documents, is that
24 correct, of the -- back in September of 2014 -- strike that
25 question.

F8IHGOMH

Capeci - cross

1 Mr. Capeci, do you recall testifying -- back in
2 September of 2014 before you started scanning, did you keep all
3 of the original documents that employees signed, whether
4 employment applications, arbitration agreements, in a box?

5 A. We tried to, yes.

6 Q. Okay. At some point in time, you started using arbitration
7 agreements; is that correct?

8 A. Yes.

9 Q. You started using arbitration agreements back in September
10 of 2014; is that correct?

11 A. Approximately.

12 Q. In conjunction with that, you created an arbitration
13 agreement, is that right, on computer; is that correct?

14 A. I didn't create it. I copied it.

15 Q. Okay. Where did you copy did from?

16 A. From an attorney.

17 Q. And it was at that time in September 2014?

18 A. Approximately.

19 Q. Okay. At some point in time, in conjunction with this
20 case, did you save the file that you had created and provided
21 to your attorney on a thumb drive, the actual --

22 A. Your question is incorrect. I didn't provide it to the
23 attorney. The attorney provided it to me.

24 Q. -- computer file?

25 The document -- was there a document exchanged -- was

F8IHGOMH

Capeci - cross

1 there a thumb drive exchanged with my office?

2 A. Yes.

3 Q. Okay. What was the source of that thumb drive?

4 A. The source of the thumb drive was the current arbitration
5 agreement that's on computer in the office.

6 Q. Now, when you were giving instructions to your staff at
7 Lace, it was to get the documents signed and filled in by the
8 employees and then come back for your signature; correct?

9 A. Yes.

10 Q. Once that happened, once you signed it, then you would have
11 been -- at that point in time you would have been in possession
12 of an original of your signature and the other person's
13 signature at the moment of you signing it; correct?

14 A. I would assume so.

15 Q. At that point the original, back in September of 2014, was
16 just put in a box which went up to the third floor in storage;
17 is that correct?

18 A. I don't recall specifically, but that's what should have
19 happened.

20 Q. Do you recall that you understood the arbitration agreement
21 to stop the employees from being able to sue you in court?

22 MS. KINSLEY: Objection. Calls for a legal
23 conclusion.

24 THE COURT: Oh, no. Oh, come on. Answer the
25 question.

F8IHGOMH

Capeci - cross

1 THE WITNESS: No, it doesn't prevent them from suing
2 me in court. It prevents them from -- forces them into an
3 arbitration. Obviously, we're in court now.

4 BY MR. ROTH:

5 Q. Right. But, essentially, the purpose of this document was
6 that you are going to tell your employees you can't come to
7 court and you can't institute a class action against me; is
8 that correct?

9 A. That's the intent.

10 Q. You were going to use this in your defense, as you're
11 trying to here today; correct?

12 A. Yes.

13 Q. Did you make any special attempts to secure those documents
14 knowing that they were going to be used for litigation at all?
15 Did you take any steps other than putting them in the box?

16 A. Not at that time, no.

17 Q. Okay. Do you recall being asked this question and giving
18 this answer at your deposition, page 54, line 2:

19 "Q. It has been represented to the plaintiffs in this case
20 that the actual original arbitration agreement for Jacqueline
21 Gomez cannot be found. Does it make any sense to you that the
22 original would not have been in that box?

23 "A. Does it make any sense? Well, it is what it is. Reality
24 is reality. Why? How? Where? I have no idea.

25 "Q. So my next question would be, was it the practice when

F8IHGOMH

Capeci - cross

1 they filled out an arbitration agreement to make a copy of that
2 on top of the original?

3 "A. No."

4 A. Can you ask me a question.

5 THE COURT: The question was were you asked those
6 questions at your deposition and did you give those answers?

7 THE WITNESS: I seem to recall that, yes.

8 THE COURT: Thank you, sir.

9 Q. I'm going to ask you to take a look at Plaintiffs'
10 Exhibit F. This is the licensing agreement. Do you recall
11 seeing that?

12 A. Yes.

13 Q. What is the reason that you -- there's a cross-out on the
14 signature page?

15 A. They misspelled my last name.

16 Q. Okay.

17 THE COURT: Everybody's name's misspelled.

18 Q. Now, when you were asked to find Ms. Carrasco's original,
19 you were able to find her original arbitration agreement;
20 correct?

21 A. Yes.

22 Q. And you were able to find Ms. Gomez's original employment
23 application; correct?

24 A. Yes.

25 Q. And you were able to find Ms. Carrasco's original

F8IHGOMH

Capeci - cross

1 employment agreement; correct?

2 A. Yes.

3 Q. But you can't find the original of Ms. Gomez's?

4 A. Yes.

5 Q. Do you also recall that you testified about at the time
6 these arbitration agreements were being given out that you had
7 to stay on top of the managers to get them signed? Do you
8 remember that?

9 A. That -- yes, there was more than one request made to get
10 them all signed and returned.

11 Q. Okay. You were staying on top of the managers at that
12 point to make sure that they accomplished this task; correct?

13 A. I don't know your definition of staying on top of the
14 managers.

15 Q. Okay. Did you make multiple requests to the managers and
16 even cause them to create a list for everything that was not
17 done and try -- for all the arbitration agreements that were
18 not signed and get them signed?

19 A. Yes.

20 MR. ROTH: I have no further questions.

21 MS. KINSLEY: No redirect.

22 THE COURT: Thank you very much, Mr. Capeci.

23 (Witness excused)

24 MS. KINSLEY: We have no further witnesses.

25 THE COURT: Okay. Why don't you take ten and then

F8IHGOMH

Summation - Ms. Kinsley

1 come back, and you can argue your respective positions.

2 MS. KINSLEY: Your Honor, while there's a break, may I
3 provide Defense Exhibit F, the exemplars to be copied?

4 THE COURT: We'll make a photocopy.

5 MS. KINSLEY: Thank you.

6 (Recess)

7 MR. ROTH: Your Honor, I wanted to clarify something.

8 THE COURT: Yes.

9 MR. ROTH: Because you said you had read his
10 deposition, I didn't offer them.

11 THE COURT: I read his deposition.

12 (Pause)

13 THE COURT: Okay. All right. I'll hear from the
14 defendant first and then the plaintiff.

15 MS. KINSLEY: Thank you, your Honor.

16 This case is very simple, and it all boils down to one
17 question: Whether Jacqueline Gomez's signature on the
18 arbitration agreement is authentic and hers or not. There is
19 sufficient evidence before the Court today to demonstrate that
20 the signature is authentic and that the agreement is
21 enforceable.

22 As the Court heard from Mr. Capeci in his declaration,
23 as owner of the business, he instituted a policy last fall that
24 all employees must sign an arbitration agreement as a condition
25 of their continued employment. Part and parcel with this

F8IHGOMH

Summation - Ms. Kinsley

1 policy, Mr. Barnes, as manager of the club, provided the
2 arbitration agreement to Ms. Gomez. He remembers doing that;
3 and, in actuality, she didn't dispute that she received it.
4 Mr. Barnes also remembers receiving the agreement back from
5 Ms. Gomez with the signature; and, in fact, he made a check
6 mark on the list of names of employees who had not yet returned
7 their agreement. You have that before you. It's Defendants'
8 Exhibit A. From there the document was forwarded to Mr. Capeci
9 who signed it, and he has testified to that as well. The
10 document was then maintained in the regular course of business
11 as part of a regular business activity of MLB Enterprises.

12 One word about Mr. Picciochi, the plaintiffs' document
13 examiner. He reached no opinion about the authenticity of the
14 signature. So, in essence, his testimony is a wash. It
15 provides no assistance to us in determining whether Ms. Gomez
16 did or did not sign the agreement.

17 However, I would encourage the Court to review the
18 signature. Mr. Picciochi may not have been able to reach an
19 opinion, but your Honor can. The signatures on the employment
20 application, which Ms. Gomez admits signing, and the
21 arbitration agreement, which she disputes, are very similar. I
22 would also encourage the Court to take a look at Defendants'
23 Exhibit F, which are all of the handwriting exemplars provided
24 by Mr. Picciochi. I have reviewed them myself this morning,
25 and there are many of Ms. Gomez's signatures contained in

F8IHGOMH

Summation - Ms. Kinsley

1 Defendants' Exhibit F which are less similar, much less
2 similar, to the signature that's contained on the arbitration
3 agreement. She does not dispute that those were her
4 signatures. She only disputes this one, and many of them look
5 different.

6 The Court need not find that Ms. Gomez lacks
7 credibility or that she is, in fact, lying today in order to
8 reach the conclusion -- and nor am I suggesting that she is --
9 in order to reach the conclusion that she did, in fact, sign
10 the arbitration agreement.

11 THE COURT: I don't see how that could possibly be.

12 MS. KINSLEY: She may be confused about what she
13 signed or did not sign. Certainly, Mr. Barnes --

14 THE COURT: I don't know. She's not the one who had
15 confusing and lax recordkeeping policies.

16 MS. KINSLEY: Yes, your Honor. There is evidence in
17 the record that suggests that the recordkeeping here could have
18 been --

19 THE COURT: Could?

20 MS. KINSLEY: -- could have been more in order. I
21 would agree with that.

22 THE COURT: I know you can't say more than that. It's
23 your client. Never insult your client when he's sitting right
24 behind you.

25 MS. KINSLEY: I agree, your Honor. And I would note

F8IHGOMH

Summation - Mr. Roth

1 that this is a service industry business. This is not an I.T.
2 company. It's not a sophisticated office with fancy computer
3 equipment or lots of individuals who are trained in how to
4 maintain documents as part of the business. This is a service
5 business. It's a bar and it's a gentlemen's club. So
6 recordkeeping is not the business that they are necessarily in.
7 They did the best that they could.

8 The key here is that Mr. Barnes recalls giving and
9 receiving the signed agreement back. Mr. Capeci signed it and
10 maintained it. We submit that's sufficient evidence for the
11 Court to find that this agreement was signed by Ms. Gomez and
12 is enforceable and that the case should be sent to arbitration.
13 Thank you.

14 THE COURT: Give me one minute. Okay.

15 Okay. I'll hear you.

16 MR. ROTH: Thank you, your Honor.

17 Ms. Gomez denies signing the agreement that was
18 produced by the defendants.

19 THE COURT: I'd have to find her to be a liar in order
20 to rule against her?

21 MR. ROTH: Those words didn't come out of my mouth,
22 your Honor.

23 THE COURT: No, but she's your client. She's sitting
24 right behind you. But she flatly denies having --

25 MR. ROTH: That's right.

F8IHGOMH

Summation - Mr. Roth

1 THE COURT: Flatly denies it.

2 MR. ROTH: That's right. And the defendants could not
3 produce the original agreement, but without doubt, they had
4 last possession of it because there was no original until
5 Mr. Capeci signed the agreement.

6 Additionally, the testimony was it was a practice of
7 Lace not to make copies. So how did this copy come to ever
8 exist? They should only have the original. They shouldn't
9 have a copy without some further explanation.

10 Mr. Capeci is a CPA. He testified that because of --
11 as he said in his deposition, because of the lawsuits, he was
12 instituting arbitration agreements, and he knew that those
13 arbitration agreements and class action waivers were for the
14 sole purpose of preventing a person from bringing a lawsuit in
15 federal court, and they would have to go to arbitration. They
16 couldn't bring a class action. And full well knowing that that
17 is the sole purpose of this document, they took no special
18 steps to preserve it, or maybe they did, because they seem to
19 have had Ms. Carrasco, who admitted to signing the document,
20 they had her original. They had the original of the employment
21 application that was kept in this box, but they could not find
22 the original of Ms. -- of this document.

23 The testimony was that all of these arbitration
24 agreements are the same. As the Court pointed out, you do not
25 need to be a forensic document examiner to see that these are

F8IHGOMH

Summation - Mr. Roth

1 different, completely different documents. There is no
2 similarity to these documents -- excuse me, there's similarity.

3 THE COURT: There's a lot of similarity. There were a
4 few differences.

5 MR. ROTH: But the thing is that -- your Honor, I
6 misspoke. I misspoke.

7 THE COURT: Right.

8 MR. ROTH: I overreached.

9 THE COURT: You don't need to overreach.

10 MR. ROTH: Yes, I'm sorry. So these documents are
11 different. There's no question that the testimony was we
12 provided the same document to everybody, and they signed it.
13 The defendants did not even attempt to explain why the
14 signature pages on these documents have the differences.

15 I'm not going to go over all of the differences.
16 They're obvious to the Court. The plaintiffs' expert --

17 THE COURT: You can do what you want. It's not the
18 most persuasive evidence that you've offered.

19 MR. ROTH: That the documents have -- that there's a
20 bracket around MLB?

21 THE COURT: Yes.

22 MR. ROTH: There's no evidence that they produced any
23 other arbitration agreement. There was one arbitration
24 agreement. And then even then, under Exhibit J, if you look at
25 Exhibit J, which they got into -- which they obtained in 2015,

F8IHGOMH

Summation - Mr. Roth

1 it matches the Carrasco signature page. It does not match her
2 signature page, and that was the form that was being
3 promulgated at the club at that time. There's been no
4 explanation whatsoever by the defendants herein as to how that
5 could possibly be. How could these forms be different if they
6 only used one form? And the testimony was everybody got the
7 same form.

8 Additionally, I think that there's questions of
9 Mr. Barnes saying that he got it back from people, that it had
10 check marks, but yet he testified that there were other people
11 that he received it -- that he gave the documents to and he got
12 it back. And somehow he remembers Ms. Gomez's, but the check
13 marks on his paper don't match his testimony saying that he got
14 back documents from other people, which he clearly testified
15 that he did not get back.

16 The plaintiffs' expert was honest in that he could not
17 make a determination because the signature of Ms. Carrasco is
18 not specific enough; and, therefore, the original was crucial.
19 The original was crucial to his analysis. And the fact that it
20 was not complex and it's -- he said it's an easy signature to
21 imitate, that issue is certainly not -- is something anybody
22 can say, hey, that those signatures look similar.

23 So even the expert said, Hey, they look too similar
24 for you to make a definitive statement one way or the other.
25 The defense would have you say, and anybody could look at it

F8IHGOMH

Summation - Mr. Roth

1 and make it, but he said he couldn't. The fact that the
2 original's not available, we couldn't do the ink testing, he
3 couldn't look at it under a microscope, he couldn't do all of
4 the different testing that is available.

5 Additionally, one of the other things is that these
6 documents were signed the same day by Mr. Capeci, and they were
7 dated the same day. Ms. Gomez says she wasn't there that day.
8 There's -- clearly these documents, the testimony was there was
9 only one of them, yet they're dated the same day and they're
10 different.

11 Additionally, there was pressure on the managers to
12 get these things signed. So who knows what happened with this?
13 And the testimony also was that the signature of Mr. Capeci
14 doesn't have natural variation between those two documents that
15 were produced for the Court and that were produced to us. And
16 the other thing is that as -- in our submission, all of these
17 documents were produced by the defendants to us except for
18 Exhibit J, which was sent by her friend.

19 Your Honor, I would submit to you that if you're going
20 to use a document and your company has a practice of not making
21 copies and that the documents are different and that you can't
22 find the original, you have to come up with some other
23 explanation, better explanation, than it is what it is to keep
24 Ms. Gomez out of the courthouse.

25 THE COURT: Okay. Why don't you guys give me ten

F8IHGOMH

Summation - Mr. Roth

1 minutes, and I'll tell you what the answer is. Okay.

2 (Recess)

3 THE COURT: Okay. The bottom line is that Jacqueline
4 Gomez's signature on her arbitration agreement is a forgery,
5 and she never signed the document. Therefore, while Yashira
6 Carrasco must arbitrate, and this action as to her stayed
7 pending arbitration, Ms. Gomez may litigate, and as to her, the
8 motion to stay or dismiss pending arbitration is denied.

9 Herewith the reasons I have reached as conclusion:

10 (1) I find Jacqueline Gomez to be a credible witness.

11 (2) While there is no expert testimony opining that
12 Ms. Gomez's signature is not authentic, it's my conclusion as
13 the finder of fact that Ms. Gomez's signature -- which is not a
14 signature at all, it is a swirl; it is a scrawl; there is not a
15 single recognizable letter in it -- would be extremely easy to
16 imitate. I looked at it for a long time yesterday, and I did
17 not originally intend to look at the other exemplars. I looked
18 at it both on her employment application and arbitration
19 agreement. I didn't originally intend to look at the
20 exemplars, but at Ms. Kinsley's invitation, I did look at them,
21 and all the signatures look similar. They're all scrawls in
22 roughly the same form with that big curlicue at the end. It's
23 just a curving line. It's not handwriting at all. And I
24 suspect that even I, who have absolutely no artistic talent,
25 could come up with a credible facsimile of that curving line.

F8IHGOMH

Summation - Mr. Roth

1 (3) The persuasive evidence, in addition to
2 Ms. Gomez's credible testimony, is the fact that Ms. Gomez is
3 unlikely to have been the person who printed her name and date
4 on the arbitration agreement that is attached to her affidavit
5 as Exhibit A. Her printed name is misspelled. I do not
6 believe that Ms. Gomez misspelled her own name. The date
7 contains dashes between the numbers, whereas when she dated her
8 employment agreement, the only comparator document that I had
9 prior to the hearing, Ms. Gomez used slashes, not dashes,
10 between the numbers. Ms. Gomez also used slashes every time
11 she dated a document in Defendant's Exhibit F, the comparators.
12 I can see that. I don't need a questioned documents expert to
13 point that out. In fact, I think the questioned documents
14 expert's testimony is pretty much a waste of time in this case.

15 I've looked long and hard at Ms. Gomez's employment
16 application, the only comparator I had prior to the hearing,
17 and I do agree with the testimony of Mr. Picciochi that a
18 different person printed Ms. Gomez's name on her employment
19 application and on the arbitration agreement. And you have now
20 heard all the testimony of Mr. Picciochi that consider to be
21 relative or probative of anything in this case.

22 (4) I've considered the possibility that Ms. Gomez
23 might have signed the arbitration agreement while someone else
24 filled in the printed information. I reject that possibility.
25 The testimony of every witness in this case was to the effect

F8IHGOMH

Summation - Mr. Roth

1 that the employee was required to sign the arbitration
2 agreement and print his or her name on the agreement and put
3 the date on the agreement. That was the customary practice.
4 No witness has testified that the customary practice was not
5 followed in the case of this particular employee, and I would
6 be speculating if I were to conclude that the customary
7 practice was not followed in the case of Ms. Gomez.

8 (5) Ms. Gomez also testified credibly that she was
9 sent a second copy of the arbitration agreement, somewhat
10 modified from the version that she ostensibly signed but really
11 didn't sign, in January 2015. There would have been no reason
12 to send her a second copy if she signed the first one she was
13 given.

14 (6) I do not credit the testimony of Mario Barnes that
15 he received a signed copy of the arbitration agreement back
16 from Ms. Gomez. I attach no significance to the fact that
17 Ms. Gomez's name was crossed off a list of names of employees
18 who had not yet returned their arbitration agreements. There
19 is no way to know when that list was created or when her name
20 was crossed off.

21 (7) However, to the extent that the list proves
22 anything, it tends to prove that Ms. Gomez did not sign the
23 arbitration agreement on September 24, 2014, which is the date
24 on which she purportedly signed it, since it's the date that's
25 inserted on Plaintiff's Exhibit A-2. The list was supposedly

F8IHGOMH

Summation - Mr. Roth

1 created to monitor delinquencies, people who did not return the
2 agreement after it was given to them. It was created because
3 the managers needed prodding to get the signed documents back.
4 It is called "Missing Arbitration," but September 2014 is when
5 the arbitration agreements were created and passed out.
6 Mr. Capeci so testified in his affidavit, and I credit that
7 testimony. I also credit the testimony of Mr. Barnes that this
8 new practice occurred in the fall of 2014, and the fall did not
9 begin until around September the 21st. So if Ms. Gomez signed
10 the agreement on September 24, 2014, the third day of the fall
11 of 2014, there was absolutely no reason to put her name on a
12 delinquent list. Infinitely more persuasive evidence than a
13 questioned documents expert.

14 (8) I have considered and rejected the possibility
15 that the list that Mr. Barnes testified about is a list of all
16 employees who were given the agreement to sign. First of all,
17 no one testified that that was what the list is. Second, at
18 his deposition, Mr. Capeci testified that there were many more
19 employees at the club at any one time than the 11 persons who
20 are reflected on this list. At any given time there were about
21 ten waitresses, four bartenders, four bar-backs, two hosts, six
22 to eight security -- 26 to 28 people at any given time, in
23 addition to Mr. Capeci and his three managers, as well as the
24 dancers who Mr. Capeci said are independent contractors. And,
25 of course, there's likely some turnover from time to time. For

F8IHGOMH

Summation - Mr. Roth

1 example, I believe Ms. Carrasco was hired in January of 2015.
2 So 26 to 28 is a low number for total employees who would have
3 been required to sign an arbitration agreement, and there are
4 only 11 names on the list.

5 (9) The fact that no original can be found, when the
6 representatives of defendants testified credibly that they
7 retained the original and never made photocopies of those
8 originals, is simply inexplicable. It defies belief there
9 would be a photocopy of Jacqueline Gomez's arbitration
10 agreement but no original, but no other photocopies of
11 agreements and all originals.

12 (10) I do not know why Ms. Gomez was not fired when
13 she did not return a signed arbitration agreement. Mr. Capeci
14 did testify that that was his policy. I suspect that the
15 failure to conform to policy was an oversight due to the
16 careless recordkeeping and lax management style that Mr. Capeci
17 forthrightly testified was followed at his company. But I need
18 not speculate about the matter. The fact is I do not believe
19 that Ms. Gomez signed the arbitration agreement, and I deny the
20 motion to dismiss or stay pending arbitration as to her.

21 So I suspect that this action is going to be going
22 forward not as a class action, because I suspect you're not
23 going to find that there are very many people who didn't sign
24 that arbitration agreement. Am I guessing correctly?

25 MR. ROTH: Your Honor --

F8IHGOMH

Summation - Mr. Roth

1 THE COURT: Not you. He's the plaintiff, the master
2 of his complaint.

3 MR. ROTH: Your Honor, New York State goes back six
4 years, and they only started signing them in September of 2014.
5 And as you correctly pointed out, that there is high turnover,
6 and I believe that there's many numerous -- you know, possibly
7 hundreds, I have no idea at this point in time, but the
8 testimony was off the cuff ten to -- there was a lot of
9 employees that were listed. And at this point in time, it
10 seems, if you can go back six years on the Rule 23 and three
11 years on the FLSA, that there is the potential to have a
12 numerosity in this case.

13 THE COURT: Okay. You have 45 days to take discovery
14 on class issues, and you have to make your motion -- you have
15 until the end of September to take discovery on class issues,
16 and you have to make your motion -- you're going to make a 216
17 motion or are you going to make a Rule 23 motion also?

18 MR. ROTH: Your Honor, generally what we've done is we
19 do the 216 first.

20 THE COURT: Yes, I know that. I'm aware of that.

21 MR. ROTH: And then depending on what happens there,
22 since it's a much lower standard, then we move for Rule 23 at
23 the same time as they decertify is usually -- or sometime after
24 that, once the class discovery gets going.

25 THE COURT: You have until October 16 to make your

F8IHGOMH

Summation - Mr. Roth

1 motion, your 216 motion. On November 6, for a response from
2 the defendant. November 13 for a reply.

3 Meanwhile, Rule 26 discovery can proceed as to
4 Ms. Gomez, which is to say that all of the records relating to
5 her hours, her pay, her tips, her whatever, should be assembled
6 and produced to plaintiff's counsel. Okay. Ms. Carrasco has
7 to go to arbitration.

8 There you have it. You have a schedule.

9 MR. ROTH: Your Honor, you said that very fast. The
10 last part, it said --

11 THE COURT: Get the transcript.

12 MR. ROTH: Okay. Thank you, your Honor.

13 THE COURT: I'm going to get a copy of the transcript
14 because I'm going to file it. That's the opinion. All right.

15 MR. ROTH: Thank you, your Honor.

16 MS. KINSLEY: Thank you, your Honor.

17 THE COURT: All right. Thank you, everybody.

18 (Adjourned)
19
20
21
22
23
24
25